its demonstrative value. Thayer, Preliminary Treatise on Evidence, p. 525.

It is to be noticed that there is a class of decisions much like the present in which there is a distinct conflict of authority. Where, unlike the principal case, there is no eyewitness to the accident, some courts allow the admission of past habits as sole proof of care or of negligence, as the case may be. *Chicago, R. I. & P. Ry. Co.* v. *Clark*, 108 Ill. 113. But there is on principle no distinction between this class of cases and those of which the present is an example. Such evidence should be always excluded. And the attitude of some courts in thus disregarding the true nature of the tribunal to which this proof is offered can only be explained by a desire to prevent hardship. Such decisions, then, as *Chicago, R. I. & P. Ry. Co.* v. *Clark, supra*, afford small reason for doubting the soundness of the result reached in the principal case.

IMPOSSIBILITY AS A DEFENCE. — That land taken by compulsory process is freed from restrictive covenants when their performance becomes impossible, is ruled in a recent English case. *Anderson* v. *Manchester, S. & L. R. R.*, 52 Solicitors' Journal, 396. A railway company were authorized by statute to take certain premises. A part of this land was then held under a lease with a covenant for quiet enjoyment. The lessor conveyed the reversion to the railway company. The railway company afterward used the property in a way that would clearly have made them liable to the lessee upon the covenant had they been ordinary assignees. But the Divisional Court held that this assignment was compulsory and that the covenant did not run with the land against the company, since that covenant only contemplated voluntary assignees. To enforce it in the face of the statute, the court say, would be to enforce an impossibility.

A man may bind himself by an absolute contract to perform at all events or to do the impossible. But there is an accepted doctrine in qualification. Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the parties when the contract was made, a party will not be held liable by mere absolute words which, though large enough to include the contingency, were not used in view of it. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180; *Harrison* v. *Muncaster*, [1891] 1 Q. B. D. 680. So confident are the courts of their rule and of their reason that they now assert that these provisions against various impossibilities are conditions of the original promise — that to enforce them is simply to enforce the actual contract which the parties have made. *Howell* v. *Coupeland*, L. R. 1 Q. B. D. 258; *Chicago, M. & St. P. R. R.* v. *Hoyt*, 149 U. S. 1.

But is it not an absurdity to make the test the contemplation of the parties — a question of fact — when it is notorious that the parties have none of these contingencies in mind? Parties in contracting commonly contemplate performance, not breach. Now the accepted statement, it is seen, looks to a solution of the problem upon legal grounds by this interpolation of a fictitious condition. The result reached is just; but is the method justifiable? Where one is under a legal obligation he must usually perform to the letter. Such was the rule anciently: fraud, illegality, duress, and the like did not excuse at law. 9 HARVARD LAW REVIEW, 49. So it was once of impossibility. Y. B. 22 Edw. IV. pl. 26.

Again, the defence of impossibility is seen to avail not only where there is an "absolute impossibility," but often, as in the principal case, where it would be unconscionable by reason of "relative impossibility" to enforce the obligation. The very word "impossibility" seems a misnomer. Relief of this kind is more characteristic of the ethical attitude of equity than of the unmoral attitude of law. Moreover, the course of pleading furnishes a clue. If the accepted statement that the promise is conditioned be true, an obligor charged with an absolute promise should plead negatively; but impossibility is always an affirmative defence. This, again, betrays an equitable origin. To look at the principal case from this point of view, the covenant for quiet enjoyment is absolute, and it runs to the railway company as assignee. But it is against conscience to hold the lessors to their legal liability when the breach is authorized by an act of Parliament. The defence is conclusive, but it is not based upon the legal fiction of an implied condition. It is rather an affirmative defence equitable in origin.

THE JURISDICTION OF EQUITY OVER CRIMES. — In view of the state of American decisions on the subject, it may be with bad grace that we can criticise an English case enjoining the commission of a criminal offence. No English court has ever gone to the length of *United States* v. *Debs*, 64 Fed. Rep. 724, in which case at the suit of the United States an injunction was granted and addressed to some persons who had not even been joined as defendants in the suit, restraining them from flagrant breaches of the peace. Yet the final decree of the Court of Appeal in the case of *Lyons* v. *Wilkins*, noted in the Law Times, Dec. 24, 1898, is not free from doubt. The defendants' offence was conspiracy; striking members of a Trade Union picketed the plaintiff's works in order to impede his business. Upon the motion for an interlocutory injunction the chief argument was on the question whether the defendants' acts were criminal under the Property Act, 38 & 39 Vict. c. 86, and the injunction granted was in its wording aimed at the statutory offence. [1896] 1 Ch. 811. Mr. Jenkins, Q. C., suggested that this was not the proper attitude for a court of equity, but his objection left no impress upon the form of the decree. At the hearing of the cause Mr. Justice Byrne does not seem to have been entirely clear upon the matter. 48 L. T. Rep. 618. He delayed his decision until after the decision of the civil action of *Allen* v. *Flood*, [1898] App. Cas. 1, and modified his decree somewhat in accordance with that case; in this he seemed to be regarding only the common-law tort. But he made another alteration in the decree forbidding the defendants from besetting the premises of one of the plaintiff's employees "for any purpose except merely to obtain or communicate information;" this change he made to fit the words to the phrasing of the Property Act, and in making it he must have been thinking solely of the statutory offence. Finally the decree of the Court of Appeals is apparently framed with equal care in conformity with the statute. The result can hardly be thought satisfactory, for in theory the court of equity should not have looked at the statute at all. *Sparhawk* v. *Union Passenger Ry. Co.*, 54 Pa. St. 401. Although equity does not lose jurisdiction over a tort, when that tort happens to be a crime, its jurisdiction is not because of, but in spite of, the criminality of the act. A public nuisance causing special damage, or perhaps a libel, may be enjoined. The reason is that the act, besides